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No. 90-___

In The

Supreme Court of the United States

October Term, 1990

MARGARET DANEHY MAYNARD,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a local rule of a United States District Court, limiting attorney admission to practice to members of a particular state's bar, violates due process as guaranteed by the Fifth Amendment of the United States Constitution because it is either arbitrary or irrational, or both.

2. Whether a local rule of a United States District Court, limiting attorney admission to practice to members of a particular state's bar, violates due process as guaranteed by the Fifth Amendment of the United States Constitution because it is not absolutely necessary to the normal, routine and effective functioning of a District Court.

3. Whether a local rule of a United States District Court, limiting attorney admission to practice to members of a particular state's bar is impermissibly inconsistent with the rules governing admission to practice before the United States Supreme Court, and as such, not in keeping with principles of "fairness" and "justice" as recently embraced in a decision by this Court in *Frazier vs. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987).

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation.

Petitioner: Margaret Danehy Maynard

Respondents: In their official capacity as judges of The United States District Court for the Central District of California,
Hon. Manuel L. Real
Hon. Jesse W. Curtis
Hon. William P. Gray
Hon. A. Andrew Hauk
Hon. Robert J. Kelleher
Hon. Lawrence T. Lydick
Hon. Albert L. Stephens, Jr.
Hon. Laughlin E. Waters,
Hon. Francis C. Whelan
Hon. David W. Williams
Hon. William M. Byrne, Jr.
Hon. John G. Davies
Hon. Ferdinand F. Fernandez
Hon. Richard A. Gadbois, Jr.
Hon. Terry J. Hatter, Jr.
Hon. Harry L. Hupp
Hon. James M. Ideman
Hon. William D. Keller
Hon. David V. Kenyon
Hon. J. Spencer Letts
Hon. Ronald S. W. Lew
Hon. Consuelo B. Marshall

LIST OF INTERESTED PARTIES – Continued

Hon. Mariana R. Pfaelzer
Hon. William J. Rea
Hon. Edward Rafeedie
Hon. Pamela Ann Rymer
Hon. Alicemarie H. Stotler
Hon. Robert M. Takasugi
Hon. A. Wallace Tashima
Hon. Dickran Tevrizian
Hon. Stephen V. Wilson

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No. 90-___

In The

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October Term, 1990

MARGARET DANEHY MAYNARD,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Margaret Danehy Maynard, Petitioner, prays that a Writ of Certiorari issue to review the decision on appeal before the United States Court of Appeals for the Ninth Circuit, affirming a judgment in the United States District Court for the Central District of California, dismissing Petitioner's case on a motion for dismissal brought by the

Respondents. The decision after rehearing by the Court of Appeals was filed on January 9, 1991.

OPINIONS BELOW

On May 1, 1989, the United States District Court for the Central District of California (in the person of the Honorable Rudi M. Brewster, Judge of the United States District Court for the Southern District of California sitting by appointment from the Ninth Circuit United States Court of Appeals) granted the Respondents' separate motions to dismiss Petitioner's Amended Complaint without the Petitioner having had the opportunity to conduct any discovery and having any hearing during which testimony was presented on the merits of her complaint, and thereafter filed its Judgment and Order of Dismissal. The Judgment and Order of Dismissal, with leave to amend the original complaint, is set forth in a published decision in *Maynard vs. United States District Court for the Central District of California*, 701 F.Supp. 738 (C.D. Cal. 1988). A copy of the Judgment and Order of Dismissal on Petitioner's Amended Complaint, an unpublished decision, is attached hereto as Appendix "A."

On June 26, 1989, the Petitioner timely filed her Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

On October 3, 1990, the Court of Appeals filed its Order affirming judgment, without published opinion, based upon a recent decision in *Giannini vs. Real*, 9th Cir.

No. 89-55466, Slip op. 9031 (August 16, 1990). The *Giannini* decision appears at 911 F.2d 354 (9th Cir. 1990). A copy of the Order in this mater is attached hereto as Appendix "B."

On or about October 17, 1990, the Petitioner brought a petition for rehearing based upon a denial of oral argument, the Court's non-compliance with the requirements of Ninth Circuit Rule 34-4, and the Court's apparent failure to consider in this matter or in *Giannini*, supra, whether the challenged locai rule was necessary for the court to carry out the conduct of its business.

The Court granted rehearing in an Order by the Court filed on January 9, 1991, insofar as its related to the procedures required by Circuit Rule 34-4, but denied Petitioner the right to orally argue and otherwise denied the Petition for Rehearing. A copy of this Order is attached hereto as Appendix "C."

JURISDICTION

The United States Court of Appeals denied the Petition for Rehearing, insofar as it related to the merits of the case, in an order filed on January 9, 1991. This Petition For A Writ Of Certiorari is filed within ninety (90) days of that date. Jurisdiction in invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for pubic use, without just compensation.

28 U.S.C. Section 2071(a)

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

28 U.S.C. Section 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules

shall be of no further force or effect after such rules have taken effect.

United States Supreme Court Rule 5.1

It shall be requisite for admission to the Bar of this Court that the applicant shall have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or of the District of Columbia for the three years immediately preceding the date of application and shall have been free from any adverse disciplinary action whatsoever during that 3-year period, and that the applicant appears to the Court to be of good moral and professional character.

Central District of California Rule 2.2.1

Admission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California.

Northern District of California Rule 110-1

Admission to and continuing membership in the bar of this court shall be limited to attorneys of good moral character who are active members in good standing of the bar of and who are eligible to practice before any United States Court or the highest court of any State, Territory or Insular Possession of the United States.

STATEMENT OF THE CASE

Petitioner, Margaret Danehy Maynard, is admitted to practice law in the State of Indiana and in the United States District Courts for the Northern and Southern Districts of Indiana and the Northern District of California, the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. She practices law, exclusively in the field of Immigration and Naturalization, within the jurisdiction of the United States District Court for the Central District of California, but has not sought, and does not intend to seek, admission to practice law in the State of California.

On July 20, 1987, in connection with immigration matters she was handling, Maynard sought admission to practice in the United States District Court for the Central District of California. The District Court denied her admission because of the requirement of its own Rule 2.2.1, which, in part, limits admission to persons " . . . who are active members in good standing of the State Bar of California."

On November 10 1987, Maynard commenced an action for declaratory relief, pursuant to 28 U.S.C. Section 2201, in the United States District Court for the Central District of California. As amended on September 22, 1988, with leave of court, the action, in part, sought a declaration of the Court that Rule 2.2.1 was unconstitutional as a violation of due process within the meaning of the Fifth Amendment of the United States Constitution because of its arbitrary and irrational nature. It further sought relief on the basis that the same was inconsistent with "principles of right and justice" and with United States Supreme

Court Rule 5.1, within the meaning of this Court's decision in the case of *Frazier vs. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987).

On November 4 and 8, 1988, the Respondents brought separate motions to dismiss the amended complaint, pursuant to Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim upon which relief may be granted. These motions were heard on March 27, 1989, before the Honorable Rudi M. Brewster, Judge of the United States District Court for the Southern District of California, sitting by appointment from the United States Court of Appeals for the Ninth Circuit to hear this case for the Central District of California.

On May 1, 1989, the court filed its Judgment and Order of Dismissal.

On June 26, 1989, the Petitioner timely filed her Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

The Petitioner's appeal was scheduled for oral argument on September 11, 1990, in Pasadena, California. On that date, the Petitioner and Respondents appeared, but were orally advised by the Court that oral argument of the matter would not take place.

On October 3, 1990, the Court of Appeals filed its Order affirming judgment, based upon a recent decision in *Giannini vs. Real*, 911 F.2d 354 (9th Cir. 1990).

The *Giannini* matter concerned a challenge to the entire California Attorney licensing scheme, brought by an unsuccessful applicant for admission in California. The challenge collaterally attacked the use of California

licensure as a measure of determining competency to practice in the federal courts in California because of certain perceived flaws in the California admission process.

Unlike *Giannini*, the Petitioner has never applied for admission to practice in California, and does not intend to do so, since she practices in a limited area of law of exclusive federal concern. She disagreed with the *Giannini* challenge that the California Attorney admission scheme is unconstitutionally defective.

What she does contend, is that no federal court should limit admission to those who practice before it on the basis of admission to a *single* or *specific* state's bar, such as California, in particular where there is no uniform application of such a rule within the District Courts in California, and because her competency to practice is manifest by her admission to the bar of another District Court in California.

In affirming judgment in *Giannini*, and by adoption of the earlier opinion in this case also, the Court of Appeals found six considerations given by the Respondents to justify the challenged rule under a denial of equal protection to *Giannini*. These considerations, set forth at 911 F.2d 360, are identified as follows: "(1) the defendant district courts, having no relevant procedures of their own, rely on the California bar examination for determination of fitness to practice law; (2) questions of California substantive law permeate the range of cases over which the district courts have subject matter jurisdiction; (3) membership in the California bar provides the

district courts assurance that the character, moral integrity and fitness of prospective admittees have been approved after investigation; (4) allegations of professional misconduct can be brought to the attention of the State Bar; (5) such membership helps screen applicants who are guilty of ethical misconduct in any other jurisdiction; and, (6) attorneys who are members of the California and district court bars will not chose the forum for litigation on the basis of their membership in the federal bar rather than the clients' interests."

However, conspicuously absent in the Court's decision in *Giannini*, was its own consideration of whether those same reasons would withstand a due process challenge, as raised by Petitioner. In other words, an analysis that simply affirms dismissal for the reasons set forth in the district court's decision, after finding a mere "rational basis" for the rule, does not consider whether the challenged rule is "arbitrary," "irrational" or even "necessary" to the normal functioning of a district court.

On or about October 17, 1990, Petitioner brought a Petition for Rehearing, based on the Court's lack of compliance with notice procedures set forth in Ninth Circuit Rule 34-4 and because the Court did not even take into account in reaching its decision, whether the challenged rule was "necessary for the court to carry out the conduct of its business," as had been previously considered in an unrelated attorney admission decision in *Zambrano vs. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989).

The court granted rehearing in an Order by the Court filed on January 9, 1991, based upon its lack of compliance with Circuit Rule 34-4, but denied Petitioner the

right to orally argue and otherwise denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

1. A LOCAL RULE OF A UNITED STATES DISTRICT COURT WHICH LIMITS ATTORNEY ADMISSION TO PRACTICE TO MEMBERS OF THE BAR OF A SINGLE OR PARTICULAR STATE, VIOLATES DUE PROCESS AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE SUCH A LIMITATION IS ARBITRARY, IRRATIONAL OR BOTH.

Before 1987, it had been the well established rule that District Courts of the United States were free, virtually without limitation, to establish whatever rules they desired concerning admission of attorneys to practice before them.

Indeed, in response to a prior challenge of an admission rule of a similar nature, one court has said that if "no impairment of a fundamental right or classification based on a suspect criterion is involved, any requirement for admission will be upheld that is rationally related to the applicant's fitness to practice law in the court to which he seeks admission." *Matter of Roberts*, 682 F.2d 105, 108 (3rd Cir. 1982).

In a number of recent decisions, this court has consistently struck down restrictive bar admission requirements which have come before it, thus evidencing a concern and interest on the part of the Court to review state and federal standards for admission and ensure that they are both narrowly drawn to protect the interests of

the involved court, while at the same time, not unduly infringing access to the courts by otherwise competent attorneys who might chose to practice in a particular location.

In *Supreme Court of New Hampshire vs. Piper*, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985), this Court struck down a New Hampshire Supreme Court rule that excluded non-residents from admission to the New Hampshire bar on the ground that it violated the Privileges and Immunities Clause of Art. IV, Section 2, of the United States Constitution. Most importantly, this Court noted that the ability to practice law was a right protected by this clause. *Piper*, 470 U.S. at 280-281.

This Court, consistent with the Privileges and Immunities Clause, scrutinized the New Hampshire rule to determine if (1) there was a substantial reason for exclusion of non-residents from admission in New Hampshire, and (2) the practice bore a substantial relationship to the State's own objectives.

In *Supreme Court of Virginia vs. Friedman*, 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988), using the Privileges and Immunities Clause, this Court struck down a Virginia Supreme Court rule allowing resident attorneys, admitted elsewhere, to be admitted on motion in Virginia, but which denied the same right to non-resident attorneys.

In *Barnard vs. Thorstenn*, 489 U.S. 546, 109 S.Ct. 1294, 103 L.Ed.2d 559 (1989), this Court, again, employed a Privileges and Immunities analysis to invalidate a local rule of a United States District Court requiring residency for admission to the Virgin Islands Bar Association.

In a case most closely related to the instant matter, this Court, in *Frazier vs. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987), exercised it own inherent supervisory authority over United States District Courts, under 28 U.S.C. Sections 2701 and 2702, to invalidate a local rule of a United States District Court in Louisiana requiring residence or maintenance of an office in the State, as a requisite for granting admission to practice before the Court.

In *Frazier*, this Court analyzed the rule to determine whether, within the framework of the factual context, it was "arbitrary," "unnecessary" or "irrational." The Court concluded that the rule was, as to both requirements, "unnecessary and irrational" and that it "arbitrarily discriminates against out-of-state attorneys."

In comparing *Frazier* with *Piper, Friedman,* and *Barnard*, this Court's analysis under its own "supervisory authority" is virtually indistinguishable from this Court's analysis under the privileges and immunities clause. What is however, plainly apparent, is that the Court of Appeals, in affirming the decision of the District Court in *Giannini* and hence *Maynard*, did no such analysis. Instead, it merely looked to determine if there were any reasons which would "justify" or provide a "rationale" for the rule. That is a far cry from determining if each "justification" or "rationale" provided is "arbitrary" "irrational" or simply "unnecessary."

Under such a superficial analysis, this Court would have been justified in affirming the decision of the United States Court of Appeals in *Frazier*, because the lower

Court did provided several distinct "rationales" or justifications for the rule. It would have been logical for this Court then to have then followed the reasoning of the United States Court of Appeals in *Roberts*, which dictates that "any requirement for admission . . . rationally related to the applicant's fitness to practice law" will be upheld.

Plainly, *Roberts*, can no longer be the law on rules governing admission in the District Courts, because *each* reason given by the District Court in *Frazier* for having the local rule demonstrated a mere "rational relationship" to fitness to practice law, while at the same time each reason was found by this Court to be "arbitrary" or "irrational" or "unnecessary" under the factual circumstances of the case.

What factual considerations of this case, with applications of this rule, tend to suggest the "arbitrary" or "irrational" nature of the rule? Consider the following:

The Petitioner, could lawfully handle a proceeding on behalf of one of her clients in the United States District Court in San Francisco, California. In fact, if she moved her immigration practice to the San Francisco area, she would not have this kind of a problem. If the same proceeding were to be, for whatever reason, transferred to the District Court in Los Angeles, she would have to abruptly withdraw from representation, and have her client find new counsel who might be less familiar with the law, issues and facts of the case, merely because she could not be admitted in a court having exactly the same jurisdiction, substantially the same procedures and within the confines of the same State.

The Petitioner could represent, as she consistently does, individuals before the immigration courts, but could not seek a "stay of deportation" order in the local district court. However, she could handle the appeal of a denial of that order in the United States Court of Appeals, but she could not file the Notice of Appeal or designate the record on appeal, because such must be done in the District Court to which she cannot be admitted. Yet, she is qualified to be admitted to practice before this, the highest federal court in the country, and could petition for review on behalf of that same client here.

The Petitioner could not even be admitted on a pro hac vice basis in the District Court because Central District Rule 2.2.3.2 "disqualifies" any applicant who "resides in California." That particular rule exists despite this Court's repeated denouncements of any "residency-based" standard of admission.

In the same regard, an attorney working for the government in the fields of immigration or tax, is equally impaired if not working directly in immigration or tax courts, even though the same law and issues might be involved in a District Court proceeding.

A United States Attorney, specialized in a particular area of criminal prosecution, could be admitted to handle a federal criminal matter in some District Courts, but not others. If, for example such Attorney sought transfer to California to work in another office, he or she would not need to take the California Bar if he or she sought a position with the Northern District United States Attorney's Office. If he or she chose the Central District, he or she would have to take the California Bar under local

rules. Again, if the criminal case to which he or she had been assigned in San Francisco were transferred to Los Angeles, then a new United States Attorney would have to be assigned – not based upon his or her familiarity with the case, area of federal law, or legal issues involved – based solely upon his or her licensure to practice in the State of California!

A non-California attorney practicing Bankruptcy law, could lawfully practice in San Francisco and appear in the local Bankruptcy Courts, because exclusively federal practice has been determined not to constitute the practice of law in California by the California Supreme Court and the California Court of Appeal. *In re McCue*, 211 Cal. 57, 66, 293 Pac. 47 (1930); *Cowen vs. Calabrese*, 230 Cal.App.2d 870, 41 Cal.Rptr. 441 (1964). The same attorney could probably maintain an office in Los Angeles, but could not take cases in the Central District Bankruptcy Court.

In addition, the same attorney could handle a bankruptcy appeal for any client before the Ninth Circuit Bankruptcy Appellate Panel, if admitted in the United States Court of Appeals, and in San Francisco, at his option, also appeal to the United States District Court. In Los Angeles, the attorney would have no such option because he could not be admitted to practice in the Central District and would have to pursue his client's appeal exclusively before the Ninth Circuit Bankruptcy Appellate Panel.

The existence of these factual possibilities within the confines of the same state – California – show the irrational, illogical and arbitrary way in which such a rule can be applied in the District Courts.

2. A LOCAL RULE OF A UNITED STATES DISTRICT COURT, LIMITING ATTORNEY ADMISSION TO PRACTICE TO MEMBERS OF THE BAR OF A SINGLE OR PARTICULAR STATE, VIOLATES DUE PROCESS AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE IT IS NOT ABSOLUTELY NECESSARY TO THE NORMAL, ROUTINE AND EFFECTIVE FUNCTIONING OF A UNITED STATES DISTRICT COURT.

In *Frazier,* this Court recognized the power of a District Court only to enact rules "that are necessary to carry out the conduct of its business." This view suggests that if a District Court can still conduct its business without a particular rule, such rule is, per se, unnecessary even though the same might be more "useful" or more "practical" to District Court to adopt than a less restrictive rule.

It follows that such a rule, under the reasoning of this Court in both *Piper* and *Frazier,* might be viewed as improper, if impairing the right to practice, because there would be no "substantial reason" or "close relationship" between the rule and the purpose for which it is adopted to serve.

Can a United States District Court "carry out the conduct of its business" without a rule which requires membership in the bar of the State in which it is located? In California, the question has already been answered in the affirmative. The United States District Court for the Northern District of California currently does so, and with the Petitioner as one of its own bar members. What lack of legal knowledge, training or other skill would then make her somehow incompetent to practice in another District Court in the same State?

In commenting on the admission process in the Central District, the United States Court of Appeal, in *Zambrano vs. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), had the following to say, at page 1483:

> "The substantive knowledge required to practice in federal court is generally the same throughout the country. Since 1938, the federal courts have been engaged in the task of applying a uniform body of procedure and evidence; federal statutes are applicable in all jurisdictions. As a consequence, attorneys throughout the country are aware of the nature and extent of the relevant law, and there is little reason for a district court to test substantive knowledge on the part of lawyers admitted in other jurisdictions. Similarly, ethical doubts are best resolved through state bar proceedings. 'Admission to *a* state bar creates a presumption of good moral character that cannot be overcome at the whims of the District Court.' (Citations) From a practical perspective, there exists little reason for a member of *any* state bar to fear the admissions process of the Central District; . . . " (Emphasis supplied).

Of course, in reality there is a *substantial* impediment to a member of *any* state bar to admission in the Central District, unless that person just happens to be admitted to practice in California.

What reasons would mandate this specific requirement in the Central District which do not seem to concern or effect the Northern District? It is difficult to say without the Petitioner having had the opportunity to conduct an evidentiary hearing, let alone have the ability to conduct discovery in this case, as was allowed and ordered by the Court of Appeals in the *Frazier* case.

The only reasons ever advanced by anyone in this case are those which are set forth by the Court of Appeals in its decision in *Giannini vs. Real*, 911 F.2d 354, 360 (9th Cir. 1990). With regard to each reason advanced, and in particular in light of the facts of this case, other and certainly less restrictive approaches could be employed.

In consideration of the first justification for this rule – namely, that because the federal courts have no procedures of their own they must rely on the State Bar of California – no reason whatsoever is given as to why they could not simply rely upon the admission process in any other jurisdiction, or develop one of their own. Certainly the District Court in Northern California does not need to rely only on the admission process in California to determine qualifications. This Court, under its own Rule 5.1, and the various Circuit Courts of Appeal, under Fed.R.App.P., Rule 46(a), have experienced no insurmountable problems in relying upon admission standards in several jurisdictions around the country. Such an assertion is, in effect, an insult to each and every other bar examining and admitting authority in all the other states. The Court has, in effect, determined that only the California State Bar is capable of determining competency to practice in a District Court in California. However, the experience of the Northern District of California, in that regard, stands as clear proof that such an assertion is sheer nonsense.

The second offered justification – that questions of California law permeate practice in the Central District – is a position which even the Ninth Circuit discounted in *Zambrano*, at 885 F.2d 1483. For the most part, legal issues arising in federal court do not relate to local law. More

importantly, the California bar examination does not test familiarity with California law except in the subject areas of community property, trusts and estates – subject areas which are seldom at issue in federal cases. The California bar otherwise tests on general common law principles, apparently in much the same manner as in other jurisdictions.

The logical extension of this argument is that all individuals dealing with a case arising out of California, should be admitted to practice in that state so the Courts can be assured that they are familiar with California law. The absurdity and unworkability of such a requirement is readily apparent when one considers that justices of the various Circuit Courts of Appeal and of this Court, routinely deal with a variety of legal issues from many states.

As applied to the facts of this case, one is tempted to simply ask the question: "What issues of California law permeate the field of Immigration and Naturalization?" The obvious answer is, "absolutely none!" It is an area of absolute and exclusive federal concern.

The third, fourth and fifth proffered justifications for Central District Rule 2.2.1 deal with the ethical conduct of an applicant or admitted attorney. Surely, the Court of Appeals is not intending to suggest that all of the other jurisdictions in this country do not, or simply cannot, determine character, fitness and moral integrity with the same degree or skill of competency as does California. As the Ninth Circuit has already stated: "Admission to a state bar creates a presumption of good moral character that cannot be overcome at the whims of the District

Court." *Zambrano*, 885 F.2d at 1483 (citation omitted). This Court rejected a similar justification proffered by the Virgin Islands Bar Association in *Barnard vs. Thorstenn*, 489 U.S. 546, 109 S.Ct. 1294, 103 L.Ed.2d 559 (1989), suggesting that the court could rely upon information compiled by the National Conference of Bar Examiners, a source relied upon by all bar authorities.

There is little doubt but that the court needs the ability to handle disciplinary matters and to set standards governing conduct. However, California State Bar membership is not required to accomplish this. The District Court could either: (1) require that its members be actively licensed to practice in at least one jurisdiction; or (2) make the rules of professional conduct of the State Bar of California applicable to practice in the District Court and refer all disciplinary matter to the California Bar or a special panel of the District Court, itself.

The first approach has been employed by this Court and other federal courts, including all Courts of Appeal. The second approach is currently employed by the Northern District in California. Unquestionably, the Supreme Court of a State, whether directly or through the State Bar as its authorized agent is entitled to exercise some control over individuals who practice within the State, whether licensed or not, as was noted by the Supreme Court of Nevada in *Waters vs. Barr*, 747 Pac.2d 900 (Nev. 1987).

The last proffered justification deserves little, if any, serious consideration by this Court. First, the purported justification assumes, as has been repeatedly rejected by this Court, that attorneys will not always endeavor to protect their clients' own interests. See *Barnard*, 109 S.Ct.

at 1300 (refusing to assume that a non-resident lawyer would not become familiar with local rules); *Friedman*, 108 S.Ct. at 2266 (refusing to assume that non-resident lawyers would be committed to the Virginia bar and legal profession); *Frazier*, 107 S.Ct. at 2612 (refusing to assume that non-resident lawyers would be less competent and would disserve their clients). Second, the lack of licensure in the District Court could be viewed as just as much an influence on the choice of "forum," as previously illustrated in the example involving an appeal of a Bankruptcy case. Finally, as has already been noted, there simply does not exist, within the framework of many federal proceedings, any state forum. Exactly what issues would the Petitioner encounter, in dealing with her clients in the field of immigration, which could even be addressed in California Courts?

In the cases cited, this Court has suggested a number of viable, less restrictive alternatives to ensure the competency and diligence of attorneys practicing within a particular jurisdiction. Passing a particular or specific state's bar examination is but a single – and in this case the most restrictive – method of achieving that goal.

3. A LOCAL RULE OF A UNITED STATES DISTRICT COURT, LIMITING ATTORNEY ADMISSION TO PRACTICE TO MEMBERS OF A PARTICULAR STATE'S BAR IS IMPERMISSIBLY INCONSISTENT WITH THE RULES GOVERNING ADMISSION TO PRACTICE BEFORE THE UNITED STATES SUPREME COURT, AND AS SUCH, IS NOT IN KEEPING WITH THE PRINCIPLES OF "FAIRNESS" AND "JUSTICE" AS RECENTLY EMBRACED IN A DECISION BY THIS COURT IN *FRAZIER VS. HEEBE*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987).

Title 28 U.S.C. Section 2071(a) authorizes the Supreme Court and all other federal courts to "prescribe rules for the conduct of their business." It further places limitations on such power by providing that such "rules shall be consistent with. . . . rules of practice and procedure prescribed under section 2072 . . . "

Title 28 U.S.C. Section 2072 states that the "Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for . . . the United States district courts . . . and court of appeals." It further provides that such "rules shall not abridge, enlarge or modify any substantive right."

In *Piper* at 470 U.S. 280-281, this Court embraced the view that the opportunity to practice law was a protected right.

Finally, in *Frazier*, this Court took note of the express statutory grant of authority it has to supervise the rule-making powers of the lower court and used such authority to prevent what it deemed to be "arbitrary discrimination" against "otherwise qualified individuals."

The case brought by Petitioner before this Court is far more compelling than *Frazier* from the standpoint of a limitation upon the rule-making authority in district courts. In *Frazier*, this Court was not even faced with a district court rule expressly addressed in its own rules. In this instance, Petitioner challenges a rule which states that she is not qualified to practice if she is not an "active member in good standing of the State Bar of California." At the same time, Rule 5.1 of this Court actually addresses the base qualifications by simply requiring " . . . that the applicant shall have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or of the District of Columbia . . . "

Given the fact that this Court has expressly promulgated a rule on this subject, which would allow members of the California bar and, in effect, virtually all other bars in the United States to practice before it, and Central District Court Rule 2.2.1 indicates that they cannot all practice, the local rule is plainly more restrictive than express provisions of Supreme Court Rules, and is thus "inconsistent" with Rule 5.1 of this Court, within the meaning of that term as used in 28 U.S.C. Section 2071(a) and further would "abridge" a "substantive right" to practice under 28 U.S.C. Section 2072, otherwise offered to attorneys by this Court under Rule 5.1.

What kind of a rule would be "inconsistent with" the rules of this Court such as to justify this Court invoking its own inherent supervisory authority in striking it down? This Court did not plainly say in its decision in *Frazier*.

Surely, however, if this Court would not allow a local district court the right to create a restrictive rule of a subject matter not even covered by its own rules under the *Frazier* decision, it cannot, consistent its own rules, uphold a district court rule which makes a person satisfying the express minimum qualifications for admission in this Court, incompetent to practice law in an inferior federal court.

The Petitioner has already met all the standards for qualification for admission to the bar of this Court.

CONCLUSION

This Court has never before directly addressed the issues presented in this brief, although in a number of recent decisions, it has repeatedly voiced its displeasure with admission rules, not rationally related to the stated purpose for which they were intended and proven to be unnecessary in view of the factual context. This petition has far reaching implications, not only for individual attorneys who, in an ever increasing fashion, are called upon to litigate across state lines and district boundaries, but for individuals and businesses alike who frequently find themselves involved as litigants in distant places.

Most often the forum of choice is the United States District Court, in particular because of its standardized rules of procedure and evidence and the belief that at least a fair hearing might be better obtained there, than in a state court.

Clients obliged to change their legal representation, merely because they cross geographic boundaries, can be placed at a further disadvantage due to the attorney's lack of familiarity with certain facts and the needs of a particular client, his or her lack of skills necessary to handle a particular kind of action, in addition to the costs of retaining an attorney for no other reason than his or her having membership in a local bar association. Ironically, it may well be that such an individual, having only that qualification, may be the least able, prepared or qualified to deal with the matter for which the client was obliged to retain him or her.

For the reasons set forth in the Petition herein, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARGARET DANEHY MAYNARD,	)
Plaintiff,	) NO. CV 87-07550-B(GHKx)
v.	) JUDGMENT AND
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.,	) ORDER OF DISMISSAL
Defendants.	) (Filed May, 1, 1989 Entered May 3, 1989)

Plaintiff initially filed the within action on November 10, 1987, asserting numerous constitutional challenges to the enforceability of Local Rule 2.2.1 of the Local Rules of the Central District of California. By Memorandum Decision entered September 29, 1988, this Court dismissed the action, and granted plaintiff 30 days leave to amend her

Complaint. Plaintiff timely filed an Amended Complaint. The matter again came before this Court on March 27, 1989, for hearing upon, *inter alia*, the Motion to Dismiss brought by all federal defendants herein, save and except for Judge A. Wallace Tashima.

After thoroughly reviewing the pleadings, the moving and opposition papers filed by all parties, and the arguments of counsel at the aforesaid hearing, and being fully advised in the premises, the Court finds that the complaint as amended continues to fail to state a claim upon which relief may be granted. Specifically, the Court would find that Local Rule 2.2.1 of the Local Rules of the Central District of California does not violate any constitutional right of plaintiff, and is not inconsistent with the rules of the United States Supreme Court regarding admission of attorneys, nor is the rule otherwise violative of 28 U.S.C. §2071 or any Federal Rule of Civil Procedure. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby, dismissed, as to all defendants, with prejudice.

DATED: MAY 01 1989

Rudi M. Brewster
RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ William E. Windham
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/s/ Roger E. West
ROGER E. WEST, Assistant U. S. Attorney
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APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARET DANEHY MAYNARD, Plaintiff/Appellant, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al., Defendants/Appellees.	No. 89-55741 D.C. No. CV-87-07550-B ORDER (Filed Oct. 3, 1990)

Appeal from the United States District Court
for the Central District of California
Rudi M. Brewster, District Judge, Presiding

Submitted* September 11, 1990
Pasadena, California

Before: FLETCHER, BOOCHEVER, and WIGGINS, Circuit Judges

Margaret Danehy Maynard appeals from a Judgment and Order dismissing her action for declaratory relief against the United States District Court for the Central District of California and that court's judges. We have jurisdiction pursuant to 28 U.S.C. § 1291. The issues raised by appellant have been decisively resolved by this

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

court in *Giannini v. Real*, No. 89-55466, Slip op. 9031 (August 16, 1990). Pursuant to this authority we affirm the district court's decision in this case.

Maynard's suit challenges Rule 2.2.1 of the Local Rules of the Central District of California. This rule requires that an attorney seeking admission to practice before the United States District Court in the Central District be a member in good standing of the State Bar of California. Maynard, admitted to practice in the State of Indiana and before both United States district courts in the District of Indiana and the Northern District of California, was refused admission to the Bar of the United States District Court for the Central District of California pursuant to this rule. In her appeal, Maynard asserts that Rule 2.2.1 violates the due process clause. She also contends that under 28 U.S.C. § 2071 the rule is impermissibly inconsistent with the Rules of the United States Supreme Court and the Local Rules of the Ninth Circuit Court of Appeals.

Giannini addressed and rejected the arguments raised by appellant in the present case. The court first held that Rule 2.2.1 is not a violation of the due process clause. It went on to hold that the rule was not inconsistent with the Supreme Court Rules. Finally, it held that the rule did not violate the principles of the right and justice standard set forth in *Frazier v. Heebe*, 482 U.S. 641 (1987).

The only issue raised here that was not directly considered in *Giannini* is whether Rule 2.2.1 is impermissibly inconsistent with the Local Rules of the Ninth Circuit. *Giannini's* analysis regarding the rule's asserted inconsistency with the Supreme Court Rules is equally applicable,

however, in this context. The Central District's Local Rule 2.2.1 is not inconsistent with Local Rules of the Ninth Circuit Court of Appeals.

The decision of the district court is AFFIRMED.

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARET DANEHY MAYNARD, Plaintiff-Appellant, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al., Defendants-Appellees.	No. 89-55741 D.C. No. CV-87-07550-B ORDER (Filed Jan. 9, 1991)

Before: FLETCHER, BOOCHEVER and WIGGINS, Circuit Judges.

We grant the appellant's petition for rehearing as it relates appellant's claim that she was deprived of her right to oral argument without advance notice and an opportunity to set forth reasons why argument should be heard. We find that the procedures set forth in Circuit Rule 34-4 were not followed in this case.

We construe the petition for rehearing as a statement of reasons why oral argument should be heard. Appellant contends that oral argument was necessary in order to present fully her argument that the Central District's local rule at issue was not absolutely necessary to the ability of the district court to conduct its business. Appellant relies on this court's decision in *Zambrano v. City of Tustin*, 885 F.2d 1483 (9th Cir. 1989) and asserts that

Giannini v. Real, 911 F.2d 354 (9th Cir. 1990) erroneously failed to apply the *Zambrano* decision in its analysis.

We reject appellant's premise that in order to survive appellate scrutiny *Zambrano* requires a finding that the local rule is absolutely necessary to the district court's ability to conduct its business. Rather, in its analysis of the necessity for sanctions imposed by local rule, *Zambrano* required that there be "a close connection between the sanctionable conduct and the need to preserve the integrity of the court docket or the sanctity of the federal rules." 885 F.2d at 1480. *Zambrano* does not require the invalidation of any rule that the district court could do without.

We are bound by this court's decision in *Giannini* which holds that the challenged local rule does not violate the "principles of right and justice." In accordance with Circuit Rule 34-4, we conclude that the decisional process would not be aided by oral argument because "the dispositive issue . . . has been recently authoritatively decided" and "the facts and legal arguments are adequately presented in the briefs."

This matter is ordered submitted on the briefs *nunc pro tunc*.

The petition for rehearing and suggestion for rehearing en banc has been circulated to the full court. No member of the court has requested that a vote be taken as to whether the case be reheard en banc. Appellant's petition for rehearing is denied insofar as it relates to the merits of this case and appellant's request for rehearing en banc is denied. No further petition for rehearing will be entertained. The mandate shall issue forthwith.

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

(2)

No. 90-1555

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARGARET DANEHY MAYNARD, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS (EXCEPT JUDGE A. WALLACE TASHIMA) IN OPPOSITION

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QUESTION PRESENTED

Whether Local Rule 2.2.1 of the United States District Court for the Central District of California, which requires attorneys seeking admission to practice before that court to be members in good standing of the California state bar, is constitutional as applied to petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1555

MARGARET DANEHY MAYNARD, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS (EXCEPT JUDGE A. WALLACE TASHIMA) IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-6) is unreported, but the decision is noted at 915 F.2d 1581 (Table). The opinion of the court of appeals on rehearing (Pet. App. 7-8) is unreported. The opinion of the district court (Pet. App. 1-3) is unreported. The initial opinion of the district court dismissing petitioner's action with leave to amend is reported at 701 F. Supp. 738.[1]

[1] The appendix to the petition does not include the district court's initial opinion. We have accordingly included it as an appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1990. The order of the court of appeals granting in part and denying in part a petition for rehearing was entered on January 9, 1991. Pet. App. 7-8. The petition for a writ of certiorari was filed on April 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an attorney and a California resident, maintaining a law office within the jurisdiction of the United States District Court for the Central District of California. She is a member of the Indiana bar, and is admitted to practice before the United States District Courts for the Northern and Southern Districts of Indiana. Petitioner is also admitted to practice before the United States District Court for the Northern District of California. Pet. App. 5; App., *infra*, 2a.

In July 1987, petitioner applied for admission to the Bar of the Central District of California. The United States Magistrate denied petitioner's application on the ground that she was not licensed to practice law in California, as required by Local Rule 2.2.1 of the United States District Court for the Central District of California. App., *infra*, 2a. Rule 2.2.1 provides that

> [a]dmission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California.

C.D. Cal Local R. 2.2.1.[2]

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[2] The Local Rules of the United States District Courts for the Southern and Eastern Districts of California also require

2. In November 1987, petitioner filed a federal court action against the federal respondents, namely, the United States District Court for the Central District of California and the judges of that court.[3] Petitioner challenged the constitutionality of Local Rule 2.2.1, which limits bar membership to active members of the California state bar. Petitioner alleged that the local rule violates the Privileges and Immunities Clause, the Commerce Clause, the "Equal Protection Clauses of the Fifth and Fourteenth Amendments," and the Due Process Clause. App., *infra*, 2a.[4]

In September 1988, the district court dismissed each of petitioner's claims, with leave to amend her complaint. The court rejected the claim that the local rule violates the Privileges and Immunities Clause, because that rule "is a matter of federal law legitimately administered by a federal entity." App., *infra*, 4a. Petitioner's claim, the court held, "is thus

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membership in the California state bar as a prerequisite to admission to practice. S.D. Cal. Local R. 110-3(a)(1); E.D. Cal. Local R. 180(a). By contrast, Local Rule 110-1 of the United States District Court for the Northern District of California does not require membership in the California state bar for admission to practice before that court.

[3] Respondent Judge A. Wallace Tashima is separately represented by private counsel.

[4] As petitioner is a private attorney, this case does not involve the effect of the statutory authority of the Attorney General to direct attorneys under the supervision of the Department of of Justice to appear before federal courts. See 28 U.S.C. 509, 515-519, 533. For that reason, petitioner's references to federal government attorneys (Pet. 14-15) are beside the point.

deficient as a matter of law, as State discrimination is, by definition, not possible." *Ibid.*[5] The court similarly dismissed petitioner's Commerce Clause challenge, since the local rule "is clearly based on federal law," *id.* at 6a and petitioner conceded that "the Federal Government cannot violate the Commerce Clause," *id.* at 5a.

Turning to petitioner's challenge based on the equal protection component of the Fifth Amendment, the court determined that "the proper standard of review is the rational basis test." App., *infra*, 8a. Applying that standard, the court held that respondents "have made a sufficient showing of a legitimate government interest which bears a reasonable and nonarbitrary relation to the challenged rule." *Id.* at 9a. The court recognized, for example, that "membership in the State Bar of California is a reasonable method of ensuring that certain ethical standards are met and maintained," and that the requirement "ensures that attorneys practicing in the Central District are knowledgeable in California substantive law." *Ibid.*

Finally, the court rejected petitioner's claim under the Due Process Clause. The court pointed out that petitioner "does not cite any rule, statute, or understanding that would support her claim of denial of a property right to practice law in the district court." App., *infra*, 11a. Moreover, the court concluded that

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[5] For that reason as well, the court rejected petitioner's claim based on the Equal Protection Clause of the Fourteenth Amendment. As the court recognized, "[b]ecause [petitioner] challenges a federal district court's rule, no state action is implicated, and any reliance on the Fourteenth Amendment is misplaced." App., *infra*, 6a.

> [n]othing in Local Rule 2.2.1 implicates [petitioner's] good name, reputation, honor or integrity, or imposes any stigma or other disadvantage limiting [petitioner's] employment opportunities, as would be required to support a finding of deprivation of liberty under the Due Process Clause.

Ibid.

3. Petitioner thereafter filed an amended complaint, alleging that Local Rule 2.2.1 violated the Due Process Clause, the Rules of Practice and Procedure of this Court, 28 U.S.C. 2071,[6] and the Federal Rules of Civil Procedure. Pet. App. 2.

In May 1989, after a hearing, the district court dismissed petitioner's claim. Pet. App. 1-3. The court held that Local Rule 2.2.1

> does not violate any constitutional right of [petitioner], and is not inconsistent with the rules of the United States Supreme Court regarding admission of attorneys, nor is the rule otherwise violative of 28 U.S.C. § 2071 or any Federal Rule of Civil Procedure.

Pet. App. 2.

4. The court of appeals affirmed. Pet. App. 4-6. It concluded that the "issues raised by [petitioner] have been decisively resolved by this court in *Giannini* v. *Real*, [911 F.2d 354 (9th Cir.), cert. denied, 111 S. Ct. 580 (1990)]." Pet. App. 4-5. In that case, the Ninth Circuit held (911 F.2d at 359-361) that Local Rule 2.2.1 does not violate the Due Process

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[6] That statute grants rule-making power to this Court and "all courts established by Act of Congress." 28 U.S.C. 2071(a).

Clause, this Court's Rules of Practice and Procedure, or the "principles of the right and justice standard set forth in *Frazier* v. *Heebe*, 482 U.S. 641 (1987)." Pet. App. 5.

5. In January 1991, the court of appeals granted petitioner's request for rehearing limited to considering her claim that the court's summary disposition denied her right to oral argument in violation of 9th Cir. R. 34-4. Pet. App. 7. Treating the petition for hearing as a "statement of reasons why oral argument should be heard," *ibid.*, the court rejected petitioner's contention that oral argument was needed to show that the court in *Giannini* failed to consider *Zambrano* v. *City of Tustin*, 885 F.2d 1473 (9th Cir. 1989). The court concluded, contrary to petitioner's submission, that "*Zambrano* does not require the invalidation of any rule that the district court could do without." Pet. App. 8.

ARGUMENT

Before this Court, petitioner renews her constitutional challenge to Local Rule 2.2.1, which limits bar membership to active members of the California state bar. Earlier this Term, however, the Court denied certiorari in a case raising an almost identical attack on that Local Rule. *Giannini* v. *Real*, 111 S. Ct. 580 (1990). Nothing has occurred since this Court denied certiorari in that case that would make review of this case appropriate.

1. Petitioner contends (Pet. 10-15) that Local Rule 2.2.1 violates the Due Process Clause, because the requirement of membership in the California state bar is arbitrary and irrational. That contention is without merit. For the reasons articulated by the district court, and endorsed by the court of appeals,

see App., *infra*, 11a; Pet. App. 5, Local Rule 2.2.1 plainly bears a rational relationship to an attorney's fitness to practice before the federal respondents. See *In re Roberts*, 682 F.2d 105, 108 (3d Cir. 1987).

Petitioner seeks to avoid this straightforward application of settled law by suggesting that the Due Process Clause imposes a more stringent standard of review. That suggestion is wide of the mark. As this Court has made plain, "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." *Leis* v. *Flynt*, 439 U.S. 438, 443 (1979). And federal courts have rejected the proposition that there is a fundamental right—under the Due Process Clause—to practice law. *E.g.*, *Lupert* v. *California State Bar*, 761 F.2d 1325, 1327-1328 (9th Cir.), cert. denied, 474 U.S. 916 (1985). Accordingly, the district court correctly held that "the proper standard of review is the rational basis test." App., *infra*, 8a; accord *Giannini* v. *Real*, 911 F.2d at 360; *In re Roberts*, 682 F.2d at 108 (3d Cir. 1982).[7]

Petitioner's reliance (Pet. 11-12) on this Court's decisions invalidating residency requirements for admission to state or district court bars is mistaken. See *Barnard* v. *Thorstenn*, 489 U.S. 546 (1989);

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[7] For that reason, petitioner errs in contending that the local rule survives scrutiny under the Due Process Clause only if it is "absolutely necessary to the normal, routine and effective functioning of a United States District Court." Pet. 16; see *id.* at 16-21. Contrary to petitioner's suggestion (Pet. 9, 16), the court of appeals in *Zambrano* v. *City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), had no occasion to consider the standard for reviewing the substantive validity of a local court rule. See *id.* at 1483 n.10. That case involved the standard for imposition of sanctions for an attorney's violation of a local court rule. See *id.* at 1480.

Supreme Court v. *Friedman*, 487 U.S. 59 (1988); *Frazier* v. *Heebe*, 482 U.S. 641 (1987); *Supreme Court* v. *Piper*, 470 U.S. 274 (1985). First, each of those cases involved a residency requirement that discriminated against out-of-state residents. This Court held that such requirements were invalid under either the Privileges and Immunities Clause or the Court's supervisory power over federal courts. Here, there is no such discrimination because the petitioner is a California resident; indeed, there is no residency requirement for membership in the bar of the Central District of California.

Second, in each of those cases, the non-resident attorney who challenged the residency requirement had passed the state's bar examination or was otherwise eligible for admission to the bar. *Barnard* v. *Thorstenn*, 489 U.S. at 549-550; *Supreme Court* v. *Friedman*, 487 U.S. at 61-62; *Frazier* v. *Heebe*, 482 U.S. at 643, 646; *Supreme Court* v. *Piper*, 470 U.S. at 276. As an alternative to residency requirements, this Court relied on state bar examination and membership requirements as means to ensure satisfaction of the courts' legitimate interests in the regulation of the practice of law. *Barnard* v. *Thorstenn*, 489 U.S. at 555-556; *Supreme Court* v. *Friedman*, 487 U.S. at 68; *Frazier* v. *Heebe*, 482 U.S. at 647-648; *Supreme Court* v. *Piper*, 470 U.S. at 285, 287. Here, petitioner has not sought admission to practice law in the State of California (Pet. 6), and has not been admitted to the California state bar. App., *infra*, 2a.

2. Petitioner also contends (Pet. 22-24) that Local Rule 2.2.1 must be invalidated as inconsistent with Rule 5.1 of the Rules of this Court, which provides that "[i]t shall be a requisite for admission to the Bar of this Court that the applicant shall have

been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or of the District of Columbia." Sup. Ct. R. 5.1. That contention is frivolous, since Rule 5.1 governs admission to practice only before this Court. That rule, by its terms, does not prescribe requirements to practice before United States District Courts. See *Giannini* v. *Real*, 911 F.2d at 360; *In re Roberts*, 682 F.2d at 108-109.[8]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1991

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[8] Accordingly, there is no sound reason for the Court to accept petitioner's invitation (Pet. 22-24) to invalidate Local Rule 2.2.1 under its supervisory powers. See *Frazier* v. *Heebe*, 482 U.S. at 645.

APPENDIX

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

MARGARET DANEHY MAYNARD, PLAINTIFF

v.

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS

Sept. 23, 1988

MEMORANDUM DECISION GRANTING DEFENDANTS' MOTION TO DISMISS

BREWSTER, District Judge.

I. BACKGROUND

Plaintiff, Margaret Danehy Maynard, filed this suit against defendants, the United States District Court for the Central District of California ("Central District") and all of the Central District judges. Plaintiff has asserted numerous constitutional challenges to the enforceability of Local Rule 2.2.1 of the Central District ("Local Rule 2.2.1"). Local Rule 2.2.1 provides, in relevant part, that admission to the Bar of the Central District is "limited to persons of good moral character who are active members in good standing of the State Bar of California."

Plaintiff is an attorney licensed in the State of Indiana and admitted to practice before the United States District Courts for the Northern and Southern Districts of Indiana. Plaintiff is a resident of California and maintains a law office within the jurisdiction of the Central District. Plaintiff seeks admission to the Bar of the Central District despite the fact that she is not a member of the State Bar of California.

On July 20, 1987, the Honorable George H. King, Magistrate of the Central District, denied the plaintiff's application for admission to the Bar of the Central District, based on the fact that she is not licensed to practice law in the State of California as mandated by Local Rule 2.2.1. Plaintiff seeks a declaratory judgment that Local Rule 2.2.1 is violative of the United States Constitution, and that she be admitted forthwith to general practice before the Central District.

Specifically, plaintiff avers that the requirement that she be licensed to practice law in the State of California as a condition to her admission before the Central District violates her rights under Article I, Section 8, Clause 3, and Article IV, Section 2, Clause 1 of the United States Constitution. In addition, plaintiff asserts that denial of her application for admission to the Bar of the Central District violates the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.

On August 1, 1988, the court heard defendants' Motion to Dismiss this action under Fed.R.Civ.P. 12(b)(6).

II. ANALYSIS

A. *Failure to Exhaust Administrative Remedies*

Defendants argue that the court should stay or dismiss this action pending exhaustion by plaintiff of her administrative remedies. The defendants contend that such a result would prevent the court from unnecessarily reaching constitutional issues and would provide the Rules Committee of the Central District with an opportunity to amend Local Rule 2.2.1.

The court deems Maynard's correspondence with Chief Judge Manuel Real and Judge Harry Hupp, Chairman of the Rules Committee, to be an exhaustion of her administrative remedies. Maynard wrote to these judges requesting that Local Rule 2.2.1 be amended to permit resident attorneys licensed out-of-state to join the Bar of the Central District. The Rules Committee failed to take any action in response to Maynard's letters. The court treats this as a denial of her request. Plaintiff's next recourse was the filing of an action in federal court. Thus, plaintiff exhausted her administrative remedies.

B. *Privileges and Immunities Clause of Article IV*

Maynard avers that denial of her petition for admission to the bar of the Central District constitutes an abridgement of her rights under Article IV, Section 2, Clause 1 of the United States Constitution. Specifically, Maynard alleges that Local Rule 2.2.1 unlawfully precludes her from practicing law, which she asserts is a "federally protected [sic] privilege and immunity. . . ." (Complaint IX).

Article IV, Section 2 of the Constitution provides that the "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the sev-

eral States." The Privileges and Immunities Clause prevents "a state from discriminating against citizens of other states in favor of its own." *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). Thus, the Privileges and Immunities Clause has been construed as a limitation on powers of the states and not on powers of the Federal Government. *Hawes v. Club Ecuestre El Comandante, Etc.*, 535 F.2d 140, 145 (1st Cir. 1976).

The standards imposed by federal courts for admission of attorneys are matters of federal law. *In re Snyder*, 472 U.S. 634, 645 n. 6, 105 S.Ct. 2874, 2881 n. 6, 86 L.Ed.2d 504 (1985); *Matter of Roberts*, 682 F.2d 105, 107 n. 21 (3rd Cir. 1982). District Courts possess inherent authority to govern the admission of attorneys who seek to practice before them. *See e.g., Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 2611, 96 L.Ed.2d 557 (1987); *In re Snyder*, 472 U.S. at 645 n. 6, 105 S.Ct. at n. 6.

In addition to this inherent power, federal courts are vested with express statutory authority to promulgate rules governing the admission of attorneys. 28 U.S.C. §§ 1654, 2071. 28 U.S.C. § 2071 provides in relevant part: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."

Maynard cannot state a claim for violation of the Privileges and Immunities Clause, as Local Rule 2.2.1 is a matter of federal law legitimately administered by a federal entity. Plaintiff's Privileges and Immunities Clause claim is thus deficient as a matter of law, as State discrimination is, by definition, not possible.

Plaintiff cites a number of cases in which courts have struck down attorney admission requirements under the Privileges and Immunities Clause, to sub-

stantiate her argument that the Local Rules must similarly fall. *See Supreme Court of the State of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985). However, in each of these cases, the courts were dealing with *state* laws which discriminated against *non-residents*. In the case at bar there is no state action. Furthermore, the Local Rule at issue does not discriminate on the basis of residency. Therefore, Maynard's challenge based upon the Privileges and Immunities Clause fails to state a claim upon which relief can be granted.

C. *Commerce Clause*

Maynard asserts that Local Rule 2.2.1 violates her rights under the Commerce Clause of the United States Constitution in that it unlawfully prevents her from practicing "federal law" before the Central District "which does touch and concern" interstate commerce. (Complaint VIII). Whether or not plaintiff states a claim for violation of the Commerce Clause ultimately turns upon whether Local Rule 2.2.1 is derived from state or federal law.

Maynard concedes that the Federal Government cannot violate the Commerce Clause. *In re Snyder*, 472 U.S. 634, 645 n. 5, 105 S.Ct. 2874, 2881, n. 5, 86 L.Ed.2d 504 (1985); Maynard's Points and Authorities in Opposition to Motion to Dismiss at p. 22. The Commerce Clause merely restricts actions by the states which unduly burden interstate commerce or otherwise encroach upon legitimate federal authority. *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 213, 103 S.Ct. 1042, 1047, 75 L.Ed.2d 1 (1983). Courts construing the Commerce Clause cannot invalidate federal legislation, even when it burdens interstate commerce. *Morgan v.*

Commonwealth of Virginia, 328 U.S. 373, 380, 66 S.Ct. 1050, 1054, 90 L.Ed. 1317 (1946); *Intake Water Co. v. Yellowstone River Compact Commission*, 769 F.2d 568, 569-70 (9th Cir.1985), *cert. denied*, 476 U.S. 1163, 106 S.Ct. 2288, 90 L.Ed.2d 729 (1986). Because Rule 2.2.1 is clearly based on federal law, Maynard's Commerce Clause challenge fails to state a claim upon which relief can be granted.

D. *Equal Protection Clause*

Maynard alleges that Local Rule 2.2.1 denies her constitutional rights under the Fifth and Fourteenth Amendments, "in that the District Court is using a discriminatory classification of the State of California to exclude attorneys licensed in other states, without sufficient federal justification for relying on such state classification." (Complaint XI).

To the extent Maynard's discrimination allegations are predicated upon the Fourteenth Amendment, her constitutional challenge fails to state a claim upon which relief can be granted. The Fourteenth Amendment provides, in relevant part, that "[n]o state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment, by its express terms, limits the actions of states rather than the actions of federal government. *See e.g.*, *Adams v. Howerton*, 673 F.2d 1036, 1041 n. 3 (9th Cir.), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982). Because plaintiff challenges a federal district court's rule, no state action is implicated, and any reliance on the Fourteenth Amendment is misplaced. *Matter of Roberts*, 682 F.2d at 105.

To the extent Maynard's discrimination allegations are predicated upon the Fifth Amendment, her constitutional challenge still fails to state a claim upon which relief can be granted. The Fifth Amendment does not contain an equal protection clause textually identical to that contained in the Fourteenth Amendment. However, it is generally acknowledged that the Due Process Clause of the Fifth Amendment embodies an equal protection "component" similar to that contained in the Fourteenth Amendment. *See, e.g., Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 96 S.Ct. 1895, 1904, 48 L.Ed.2d 495 (1976).

In evaluating any discrimination claim, the court must initially determine the appropriate level of scrutiny applicable to the challenged rule or government conduct. When a law disadvantages a suspect class or impinges upon a "fundamental right," the court will examine the law by applying a strict scrutiny standard. In the absence of such circumstances, the conduct or rule must be analyzed under a rational basis test. *Matter of Roberts*, 682 F.2d 105, 108 n. 3; *Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir.), *cert. denied*, 474 U.S. 916, 106 S.Ct. 241, 88 L.Ed.2d 251 (1985).

Maynard has shown neither infringement of a fundamental right nor discrimination against a suspect class which would trigger strict scrutiny. Maynard argues that the Supreme Court in *Piper* held that the right to practice law is a "fundamental right." However, *Piper* is distinguishable because it involved only the Privileges and Immunities Clause, not the Equal Protection Clause. *See Lupert*, 761 F.2d at 1327 n. 2.

Furthermore, there is no legal support for Maynard's contention that federal practitioners should

be deemed a "suspect class" for equal protection purposes. Likewise, there is no legal support for the contention that the discrimination at issue should be tested under the "heightened scrutiny" analysis applied to issues of gender and illegitimacy discrimination claims. Cases striking down bar admissions requirements under the Equal Protection Clause have found that the state's bar admission standards make *explicit* use of a suspect classification. *See, e.g., In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973). Certainly, it is difficult to see how the discrimination at issue in this case bears any of the earmarks of a "suspect class." One's status as a resident attorney licensed in another state does not have any of the immutable characteristics of alienage, nationality, or race. Nor can one see a situation where there has been widespread discrimination against a discrete and insular minority.

In this case, therefore, the proper standard of review is the rational basis test. In general, the court has been especially deferential to legislative classifications in cases of challenges to the state regulation of licensed professions. *See, e.g., Watson v. Maryland*, 218 U.S. 173, 30 S.Ct. 644, 54 L.Ed. 987 (1910); *Ohralik v. State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978); *In re Griffiths*, 413 U.S. 717, 722-23, 93 S.Ct. 2851, 2855.

In applying the rational basis test, the court has also stressed the heavy procedural burden placed upon the plaintiff in proving her case. The plaintiff in a challenge to a legislative classification, reviewed under the rational basis standard, must prove that the facts on which the legislature may have relied in shaping the classification "could not reasonably be conceived to be true by the governmental decision-

maker." *Brandwein v. California Bd. of Osteopathic Ex'rs*, 708 F.2d 1466, 1471 (9th Cir.1983) (citing *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 950, 59 L.Ed.2d 171). In reviewing the rationality of the classification, a court may hypothesize legislative purposes: "where there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.'" *Flemming v. Nestor*, 363 U.S. 603, 612, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960).

Maynard contends that there is no rational relationship between membership in the State Bar of California and fitness to practice federal law in the district court. However, defendants provide a myriad of legitimate public policy objectives for the Bar exam requirement. First, defendants suggest that the Bar exam is a reasonable gauge for determining an applicant's fitness to practice law. Second, membership in the State Bar of California is a reasonable method of ensuring that certain ethical standards are met and maintained. Third, the Bar exam requirement ensures that attorneys practicing in the Central District are knowledgeable in California substantive law. Fourth, tying District Court admission to State Bar membership protects the public by ensuring that attorneys will make choice of forum decisions solely with their clients' best interest in mind.

Under the rational basis test, defendants have made a sufficient showing of a legitimate government interest which bears a reasonable and nonarbitrary relation to the challenged rule. *C.F. Matter of Roberts*, 682 F.2d 105 (3rd Cir.1982). The Supreme Court requires nothing more than this showing. Although Maynard suggests that other district court

rules are *more* reasonably related to the Central District's articulated interests, the court need not make such a determination when applying a rational basis test. Perhaps the issue of admission to the district courts should be uniform across the United States, as plaintiff suggests. However, the appropriate forum to address such uniform admissions standards must be either Congress, the United States Supreme Court, or the District Court themselves through the United States Judicial Conference.

E. *Due Process Clause*

Maynard's final challenge to Local Rule 2.2.1 is that the Local Rule denies her substantive due process in that it prevents "substancially [sic] or equally well qualified attorneys from other states from becoming full members of the bar in defendant District Court, merely because they do not have a license to practice law in the State of California." (Complaint X).

Initially, the court must dismiss under Rule 12 (b)(6) any claim plaintiff makes under the Due Process Clause of the Fourteenth Amendment. As indicated above, the decision whether to admit an attorney to practice before a federal district court is a matter of federal law. *Matter of Roberts*, 682 F.2d at 107 n. 2. Since the Fourteenth Amendment only implicates state action, the plaintiff's reliance on the Fourteenth Amendment is misplaced.

Under the Fifth Amendment's Due Process Clause, plaintiff must first establish the property or liberty interests she asserts are subject to the protection afforded by the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

The Due Process Clause affords protection to those property interests which are created and defined by independent sources, such as statutes, legal rules, or mutually explicit understandings. *Id.* at 577, 92 S.Ct. at 2709. Maynard does not cite any rule, statute, or understanding that would support her claim of denial of a property right to practice law in the district court. Furthermore, courts have held that the right to practice law is not a property right protected by the Due Process Clause. *See Matter of Roberts*, 682 F.2d at 107; *Cf. Leis v. Flynt*, 439 U.S. 438, 443, 99 S.Ct. 698, 701, 58 L.Ed.2d 717 (1978).

Nothing in Local Rule 2.2.1 implicates plaintiff's good name, reputation, honor, or integrity, or imposes any stigma or other disadvantage limiting plaintiff's employment opportunities, as would be required to support a finding of deprivation of liberty under the Due Process Clause. *See Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707.

Thus, the court should dismiss Maynard's cause of action for violation of the Due Process Clauses of the Fifth and Fourteenth Amendments for failure to state a claim upon which relief can be granted.

F. *Conclusion*

For the above-mentioned reasons, defendants' Motion to Dismiss is hereby granted with leave to amend. Plaintiff shall have thirty days leave to amend her complaint.

IT IS SO ORDERED.

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